Supreme Court, U.S.
FILED
FEB 22 1993
OFFICE OF THE CLERK

No. 92-773

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

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WILLIAM P. BARR, ATTORNEY GENERAL
OF THE UNITED STATES, PETITIONER

v.

ADULT VIDEO ASSOCIATION, ET AL.,
RESPONDENTS

BRIEF IN RESPONSE TO GOVERNMENT'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the pre-trial restraint provisions of RICO facially violate the First Amendment to the limited extent that they authorize pre-trial seizures of media businesses and their inventories where the only alleged predicate RICO violations involve obscenity.

2. Whether the Court of Appeals erred in holding that the post-trial forfeiture provisions of RICO violate the First Amendment when the predicate acts of racketeering are exclusively obscenity violations and the forfeited property consists of the assets of a business dealing in expressive materials.

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RICO . . . . . *passim*

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I. The Post-Trial Forfeiture Issue.

In its petition for a writ of certiorari in this case, the government raises precisely the same issue that is currently pending before this Court in Alexander v. United States, No. 91-1526 (argued January 12, 1993): whether the RICO Act's post-conviction forfeiture provisions violate the First Amendment when invoked to confiscate entire media businesses exclusively for

obscenity offenses. In this case, the Adult Video Association and other plaintiffs prevailed in a pre-enforcement challenge to those provisions, the Ninth Circuit having held that total RICO forfeiture of a media business solely for obscenity offenses would violate the First Amendment.[1] Despite the obvious importance of this post-conviction forfeiture issue, the pre-enforcement injunctive nature of this facial challenge adds no new factual dimension which would further assist this Court in its resolution of the issue.[2] Respondents therefore agree with the government that consideration of this

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[1] In so holding, the Ninth Circuit parted company with the Fourth and Eighth Circuits, which held in United States v. Pryba, 900 F.2d 748 (4th Cir. 1988), and in Alexander v. Thornburgh, 943 F.2d 825 (9th Cir. 1991), respectively, that RICO forfeiture as applied in obscenity cases does not violate the First Amendment. As this Court is aware, this decision therefore created a direct split of authority among the federal circuits on this issue.

[2] Moreover, the ruling herein is only an interim one. The Ninth Circuit simply reversed an order granting the government's motion to dismiss for failure to state a claim upon which relief could be granted. At this preliminary stage of the case, the absence of any proven facts makes this case a particularly inappropriate one for plenary review by this Court.

petition should be deferred pending this Court's decision in Alexander v. United States, whereupon certiorari should be granted followed by a summary vacation and remand for further proceedings not inconsistent with this Court's decision in Alexander.

II. The Pre-Trial Seizure Issue.

Respondents disagree with the government's suggestion that this Court review the portion of the Ninth Circuit's decision regarding pre-trial seizures under the RICO Act. The only aspect of § 1963(d) which the Ninth Circuit held facially invalid was its potential to authorize pre-trial seizures of presumptively protected materials.[3]

As the government notes, § 1963(d) authorizes a number of pre-trial measures in RICO cases, providing that the court may enter "a restrain-

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[3] The Court of Appeal's holding regarding the pre-trial seizure issue was stated as follows: "Because the reasoning of Fort Wayne Books [489 U.S. 46 (1989)] is equally applicable to the federal RICO statute, we hold that *the portion of section 1963(d) that authorizes pre-trial seizures* is unconstitutional on its face." (Emphasis added.) It did not invalidate any other pre-trial asset-preservation remedies authorized by that section, nor does the government so contend.

ing order or injunction, require the execution of a satisfactory performance bond, or take *any other action to preserve the availability of property . . . for forfeiture*." (Emphasis added.) The Ninth Circuit correctly interpreted this provision as having a broad enough scope to unquestionably authorize a pre-trial seizure of the sort this Court had recently condemned in Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989).[4]

While the government asserted below that it has a "policy" not to seek pre-trial seizures under the authority of § 1963(d), it did *not* assert that the statute deprives it of the *power* to seek such a seizure order if it elects to do so. (Indeed, the first time the government even *suggested* that the statute *might* be so limited is in this certiorari petition!) Neither has the government asserted that it has *never* used the

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[4] Fort Wayne Books held that the pre-trial remedies available under Indiana's state RICO statute cannot constitutionally include pre-trial seizures of media businesses and their presumptively protected inventories where the sole predicate offenses are obscenity violations.

statute in that manner.[5] Accordingly, the government is in no position to fault the Court of Appeals for recognizing that the statute is written sufficiently broadly to authorize a pre-trial seizure order for purposes of asset-preservation and for concluding that, to that limited extent[6], the statute is facially unconstitutional.[7] Clearly, the statute's open-ended facial language (*e.g.*, authorizing district courts to "take *any other action* to preserve the availabil-

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[5] Indeed, at paragraph 32 of the complaint filed herein on November 24, 1987, the plaintiffs affirmatively alleged that the government *had* used § 1963(d) to force the pre-trial temporary closure of a business belonging to "persons whose only alleged crime was the dissemination of two or more obscene items." Since this is an appeal from the granting of a motion to dismiss, this uncontroverted assertion of fact must be taken as true for purposes of this appeal.

[6] The Court of Appeals *expressly* stated that the constitutionality of the *other* pre-trial asset-preservation remedies authorized by 18 U.S.C. § 1963(d) was not before it and was not being ruled upon as they were not challenged in this lawsuit. Adult Video Association v. Barr, 960 F.2d 781, 788, n.6 (9th Cir. 1992) (reproduced in Certiorari Petition at 16a).

[7] The Ninth Circuit merely ruled that pre-trial restraints under § 1963(d) may not be applied in a manner that would transgress the rule in Fort Wayne Books, a holding that would not hamper the government's announced enforcement objectives in any way.

ity of property ... for forfeiture") is broad enough on its face to permit pre-trial seizures of property for purposes of asset preservation.

Moreover, the government is now asserting that the Court of Appeals' primary error was that it should have ruled on the basis of statutory construction that 18 U.S.C. § 1963(d) does not under any circumstances authorize pre-trial seizures of property. (Cert. Petition at 10.) However, since it never argued this position to the Court of Appeals, nor has it ever affirmatively represented to either this Court or either of the lower courts that it has *never* sought such a seizure under the statute, the Court of Appeals could not have erred in taking the government's calculated silence on this point at face value as an implicit recognition of the government's power under the statute to seek pre-trial seizures when and if it so chooses.

For these reasons, this case raises no significant issue regarding pre-trial restraints under the federal RICO Act, and plenary review of the first question presented in this petition should be denied. However, depending on the

ultimate outcome of Alexander, it may be appropriate at that time to grant certiorari in the present case even as to the pretrial seizure issue and then summarily vacate and remand for reconsideration in light of the principles articulated in Alexander. It is, of course, possible that if this Court should find that post-trial blanket RICO forfeitures violate the First Amendment, the plaintiffs herein will be entitled to amend their complaint to seek even broader relief from the pre-trial asset-protection remedies of § 1963(d) than they have sought and/or obtained up until now.

Accordingly, as to *both* of the questions presented in the government's petition, respondents believe that the appropriate disposition would be to hold the petition until a decision is reached in Alexander and, thereafter, to grant

certiorari and vacate and remand for further proceedings consistent with Alexander.

DATED: February 22, 1993

Respectfully submitted,

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